IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7213 of 2004

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UNITED PHOSPHOROUS LTD. & 1 - Petitioner(s)

Versus

GUJARAT ELECTRICITY BOARD & 1 - Respondent(s)

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Appearance :

Mr.Rakesh Gupta with Mr.Abhishek Mehta for M/s Trivedi and Gupta for the petitioner.

Mr.N.K. Majmudar for Respondents.

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 20/10/2005

CAV JUDGMENT

1.0 The petitioners herein have challenged the action of respondents in

adjusting the amounts of the bills of the petitioners for the electricity sold by it to the respondent Gujarat Electricity Board without the consent of the petitioner no.1 and also prayed for consequential reliefs.

2.0 The short facts of the case are as under:

2.1 The petitioner company is engaged in the business of manufacturing diverse types of chemicals and for that purpose it has a manufacturing plant and office at Bharuch. The petitioner company had entered into an agreement in December 1995 with the respondent Board for supplying electricity power. The contracted demand was thereafter extended to 25000 KVA and the said agreement stipulated that the period of supply under the Agreement shall be minimum period of two years. This agreement was between a licencee and a consumer as defined under the Indian Electricity Act, 1910 (hereinafter referred to as the said Act).

2.2 In view of the power crisis in the State, the State Government has come out with power policy in the year 1995 permitting captive power generation. The said policy decision of the State Government stipulated encouragement of establishment of captive power plants by the industries in order to augment the energy generation and it was also stipulated therein that the Board would consider purchase of surplus power from such captive power plants on

mutually agreed terms.

2.3 The Electricity (Supply) Act, 1948 casts a responsibility on Gujarat Electricity Board (GEB) to coordinate electricity generation and its distribution in the whole State. Previous permission of GEB is necessary under the provisions of the said Act, if anybody wants to generate power for self consumption (captive generation). Any industrial unit intending to set up captive power plant would be given consent by GEB under Section 44(1) of the said Act to set up captive power plant and further would be permitted to supply electric power to its subsidiary/parent company from the captive power plant of parent/subsidiary company and the sanction of the State Govt. required under section 28 of Indian Electricity Act, 1910 would be granted for such purpose.The petitioner decided to set up a captive power plant as envisaged in the power policy of the State Government. The respondent Board accorded its consent as required under section 44 of the Electricity (Supply) Act, 1948 by letter dated 20.5.1996 to establish captive power plant with a capacity of 41 MW. Accordingly the petitioner commissioned the captive generation plant in the year 1997 and subsequently the respondent Board accorded its consent for enhancing the capacity by 7.5 MW with co-generation system making the total generating capacity of 48.5 MW by its letter dated 23.3.1999. It is to be noted that this agreement was also entered between the same parties in different capacities for different purpose wherein

petitioner is supplier and respondent Board is in place of consumer.

2.4 Upon commissioning of the captive generation plant of 41 MW in March 1997, the petitioner company addressed a letter dated 25.6.1997 requesting the Board to reduce its demand from 25000 KVA to 3000 KVA in view of the fact that upon commissioning of the captive plant, as approved by the Board vide its letter dated 20.5.1996, the requirement/demand of the petitioner company for power from the Board had considerably reduced and there was no purpose in continuing the earlier position regarding demand which was imposing financial burden on the company.

2.5 Resolution dated 22nd December 1997 stipulates the guidelines for Captive Power Projects. It sets out the terms and conditions for setting up of captive power plant and supply of electric power. Copy of the Resolution is produced at Annexure-D to the petition (page 58).

2.6 The respondent Board vide its communication dated 15.7.1997 informed the petitioner company that the petitioner's contract for demand was for a minimum period of two years which would expire only on 31.12.1997 and therefore the petitioner company's request could not be considered at that time and the company may apply afresh after completion of two years. Therefore, before completion of the contract period of two years, the petitioner

made the same request vide their communication dated 30.12.1997 with effect from 1.1.1998. It appears that the respondent Board has not given any reply to the said request of the petitioner for quite a long time.

2.7 The respondent Board by letter dated 18.7.1998 informed the petitioner company that as temporary, stop-gap and adhoc arrangement, the petitioner would be permitted to pay energy bill as per the reduced demand of 6250 KVA instead of 25000 KVA, but it will be billed for 25000 KVA and the difference will be treated as deferred amount without any penal interest. The said arrangement was made effective from 22.6.1998.

2.8 The Government issued a Resolution on 9.11.1998. Clauses 8 and 10 thereof provided as under:

> 8. Contract Demand:
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> The industries on commissioning of captive power plants will be allowed to reduce their existing contract demand upto a level of 25% of their original contract demand (e.g. if the contract demand is 1000 KVA it can be reduced to any level upto 250 KVA depending upon the need of the consumer) when they intend to have parallel operation with the Grid. However, no contract demand would be necessary/would be insisted upon if the industry with the captive power plant intends to operate on stand alone basis."
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> "10. All the adhoc arrangements allowed for wheeling and reduction of contract demand shall be regularized in accordance with the provisions contained in this resolution."

According to the petitioner the regularization was supposed to be made effective from the date when it became due i.e. The date in the application of the petitioner company (1.1.1998) or at least from 22.6.1998.

2.9 The petitioner company received a communication dated 14.12.1998 from the respondent Board stating that the demand was reduced to 6250 KVA with effect from 22.6.1998 and the petitioner company was required to send an undertaking as per the prescribed form. Accordingly the petitioner submitted the undertaking in the prescribed format. The petitioner company received another communication dated 29.12.1998 stating that the demand was reduced to 6250 KVA with effect from 22.6.1998.

3.0 In spite of the aforesaid communications, the respondent Board addressed another communication dated 12.5.1999 to the petitioner company stating that its earlier decision of giving effect to reduction in demand from 22.6.1998 was not correct and it has since been reviewed and that the reduction in contract demand would be effective from 9.11.1998, the date on which the Government announced its captive power policy and not from 22.6.1998 as decided earlier.

3.1 The petitioner Company therefore submitted a representation to the respondent Board on 24.5.1999 and also to the Additional Chief Secretary to

the Government of Gujarat, Energy and Petrochemicals Department, pointing out that the petitioner company had requested for reduction in contract demand from 1.1.1998 in light of the then existing power policy dated 22.12.1997.

3.2 The respondent Board did not accede to the request of the petitioner company and rejected the request by its letter dated 10.8.1999 and reiterated that the contract demand would be given effect to from 9.11.1998. Thereafter the respondent Board raised a bill and demanded about Rs.1.25 crores purporting to be towards the demand charges for the period from 22.6.1998 to 9.11.1998. The then respondent Board issued a letter dated 18.7.1998 demanding a total sum of Rs.1,45,70,832.58 inclusive of interest on the principal amount. Thereafter the petitioner had written letters to the respondent Board to review their decision which did not yield any result.

4.0 The petitioner company thereafter by way of application dated 18.1.1002 approached the Gujarat Electricity Regulatory Commission by way of filing an application which was registered as Case No.68/2002. The prayers made in the said application are as under:

> (i) declare the Bill dated 27-8-1999 for Rs.14570832.58 raised by the Respondent Board as null and void,
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> (ii) give effect of reduction in contract demand from 25000 KVA

to 3000 KVA with effect from 1.1.1998 with consequential relief in energy bills from 1.1.1998 onwards, alternatively

(iii) give effect of reduction in contract demand from 25000 KVA to 6250 KVA with effect from 22.6.1998 and

(iv) consequently write off the differential amount which is shown as recoverable for the period 22.6.1998 to 8.11.1998 in every bill on the basis that effective date for reduction in contract demand could be from 9.11.1998 and not from 22.6.1998 so that the potential threat of past recoveries wrongly shown in every bill is erased from the mind of the Petitioner and the controversy unnecessarily raised by the Board is put to rest for all times to come.

(v) Pending hearing and final disposal of this petition the respondent, its officers, servants and agents may be restrained from enforcing recovery of the aforesaid bill of Rs.1,45,70,832.58 (Rupees one crore fortyfive lacs seventy thousand eight hundred thirty two and paise fifty eight only) raised by the Executive Engineer (Industrial Division), GEB, Ankleshwar in respect of differential contract demand charges from 22.6.1998 to 9.11.1998."

4.1 From 20.6.1997 to 22.6.1998 there were various communications in pursuance of which there were some meetings with the officers of the Board and officers of the petitioner Company wherein also nothing could be materialised.

4.2 It appears that the respondent Board filed a suit in Civil Court, Bharuch claiming payment of demand charges for a period from 22.6.1998 to 9.11.1998 for recovery of a sum of Rs.1,45,90,832.58 along with interest at the rate of 25% per annum. However, the prayer for interim injunction was refused by the Civil Court.

4.3 Since the commissioning of the captive plant, the petitioner company has been selling excess power to the respondent Board as per the Board's requirement i.e. On the Board's need basis. The said selling of power is done as per mutually agreed conditions and at the rates mutually agreed. As per the agreed terms, the petitioner company raises monthly bills (depending upon the demand for power purchase made by the Board) on the Board for the power sold by it to the respondent Board and the respondent Board has been making payments of the monthly bills so raised by the petitioner company. However, the respondent Board stopped making payments in respect of the bills of the petitioner company from December 2003 onwards.

4.4 According to the petitioner, the respondent Board stopped making payments of the bills of the petitioner in connection with the electricity power sold by the petitioner company to the respondent Board from December 2003 to April 2004. The respondent Board forwarded a letter dated 17th May 2004 to the petitioner company stating that it had adjusted an amount of Rs.1.36 crore being part of the amount claimed by the Board in the suit pending in the Civil Court at Bharuch against the bills of the petitioner company for electricity power sold by it to the Board.

4.5 According to the petitioner, the said action has been taken despite the fact

that the petitioners' application before GERC is pending and Board's own suit is pending before the Civil Court at Bharuch. Further, according to the petitioner no notice was issued to the petitioner before taking such an action.

4.6 Under the aforesaid circumstances, the petitioner has filed the present petition for a declaration that the action of the respondents of adjusting the bill amounts of the bills of the petitioner for the electricity sold by it to the respondent board is without any authority of law, arbitrary and illegal and other consequential reliefs.

5.0 Mr. Rakesh Gupta appearing for the petitioners submitted that the impugned decision and action and the communication dated 17.5.2004 are without authority in law, illegal and arbitrary.

5.1 Mr. Rakesh Gupta submitted that in view of the Board's own communications dated 18.7.1997, 18.7.1998 and 14.12.1998 and thereby reducing the contract demand to 6250 KVA with effect form 22.6.1998 and after taking undertaking from the petitioner, now it is not open or permissible in law to the Board to backtrack from the said decision and act contrary to its own decisions and promises.

5.2 Learned counsel submitted that no details are provided with regard to the

huge alleged outstanding demand despite repeated requests made by the petitioners. According to him the respondent Board on their own calculated and raised the bill and demanded the huge sum which act is in gross violation of the principles of natural justice.

5.3 Mr. Rakesh Gupta submitted that the impugned communication dated 17.5.2004 is contrary to the very same resolution/policy which is being cited in support of the impugned communication. The respondent Board has conveniently overlooked the Government Resolution dated 22.12.1997, especially clause 10 of the said. As per the said G.R. Dated 9.11.1998 and also G.R. Dated 22.12.1997, the request of the petitioner company ought to have been granted and regularized with effect from 1.1.1998.

5.4 The learned counsel for the petitioners submitted that the respondent Board has illegally and arbitrarily withheld the amounts due and payable to the petitioners towards the monthly bills of December 2003 to March 2004 for the electricity power sold by the petitioners to the Board and further that the Board has no power or authority to adjust the amounts of the petitioners' monthly bills against it, which is absolutely illegal and and arbitrary.

5.5 He submitted that for purchasing power form captive power plant of the petitioners, the respondent Board had entered into a separate and an

independent arrangement/agreement which prescribes the terms and conditions (including the rates) for purchasing power by the respondent Board from the petitioner's Captive Power Plant. The said agreement is distinct and separate from the agreement entered into by and between the petitioner company and the respondent Board for supplying power to the petitioner company.

5.6 He submitted that the agreement under which the respondent Board purchases power from the petitioner company is separate and distinct from the agreement under which the respondent Board sells/supplies power to the petitioner company and the terms and conditions, including those relating to rates.

5.7 Learned counsel submitted that the application with regard to the alleged dues from the petitioner is pending before GERC and the civil suit filed by the respondent Board is pending before the Civil Court at Bharuch. When such proceedings are pending and when the Exh.5 application was rejected, the respondent Board ought not to have adjusted the amounts of the petitioner's monthly bills. Such adjustment has been made merely with a view to overreaching or preempting the proceedings before GERC and the Civil Court at Bharuch which is not permitted under law, more particularly by a State agency. This will amount to recovery of alleged dues without any decision of

competent authority and/or court.

5.8 Mr. Gupta submitted that the adjustment of the bill amounts has been made without giving any notice and without hearing the petitioners and therefore the same is without any authority in law and in gross violation of principles of natural justice.

5.9 Mr. Gupta submitted that the action of the respondent Board is illegal, arbitrary, unjust and without any authority of law and the prayers made in this petition deserve to be granted.

6.0 Mr. N.K. Majmudar for the respondents submitted that the petitioners themselves have requested the Gujarat Electricity Board to adjust the electricity bills for January to May 2004 and therefore they cannot raise a plea that the adjustments were made without their consent. He submitted that still a huge amount towards sales tax which was already paid by the respondents has to be refunded by the petitioner.

6.1 Mr. Majmudar submitted that the amount once paid and/or adjusted can never be ordered to be refunded by a writ of this Court. Any such order would amount to restraining the Board from effecting its recoveries of energy bills/public dues which form part of public revenue.

6.2 Mr. Majmudar submitted that in view of the pendency of the proceedings before the Gujarat Electricity Regulatory Commission, this petition is misconceived and deserves to be dismissed. According to him since the petitioners have already invoked the jurisdiction of Gujarat Electricity Regulatory Commission, this petition would not be maintainable.

6.3 Mr. Majmudar submitted that the action of respondents of adjusting the amount of power purchase bill is absolutely in conformity with the rules, regulations and policy laid down in this regard and therefore the prayers made in this petition cannot be granted.

7.0 As a result of the hearing and perusal of the record, it emerges that the dispute with regard to the date of reduction contract demand and the bills raised in connection therewith is already before the Regulatory Commission and therefore this Court is not required to go into the said question.

7.1 As stated earlier, the dispute with regard to the period of reduction of contract demand from 25.6.1997 to 22.6.1998 and consequential billing is the subject matter before the GERC. The only question required to be considered in this petition is whether the respondent Board was justified in adjusting the amounts of the bills of the petitioners against the amount allegedly payable by the petitioner company to the respondent Board and whether the respondent

is justified in withholding payment of the bills of the petitioner for the electricity sold by the petitioner company to the respondent Board.

8.0 It is an admitted position that initially the contracted demand of the petitioner was 25000 KVA. In view of the serious power crisis the State Government had come out with power policy in the year 1995 permitting captive power generation. In pursuance of the same with the consent of the respondent Board the petitioner has commissioned a captive generation plant in the year 1997.

8.1 Upon commissioning the plant the petitioner company addressed a letter dated 25.6.1997 requesting the Board to reduce its demand from 25000 KVA to 3000 KVA. For quite some time the respondent Board did not respond to the said request. The respondent Board informed the petitioner company on 15.7.1997 that the company's contract for demand was for a minimum period of two years which would expire only on 31.12.1997 and therefore the request of the petitioner company could not be considered at that time and the company may apply afresh after completion of two years.

8.2 Upon completion contract period of two years the petitioner renewed the said request by their letter dated 30.12.1997. Thereafter by their belated reply dated 18.7.1998 the respondent Board informed the petitioner company that

as temporary, stop-gap and adhoc arrangement the petitioner would be permitted to pay energy bill as per the reduced demand of 6250 KVA instead of 25000 KVA, but it would be billed for 25000 KVA and the difference will be treated as deferred amount without any penal interest.

8.3 The said arrangement was made effective from 22.6.1998. However, by communication dated 14.12.1998 the respondent Board conveyed that the demand was reduced to 6250 KVA with effect from 22.6.1998 and the petitioner company was required to send an undertaking in the prescribed format, which the petitioner has complied with. However, in the year 1999, by letter dated 12.5.1999 the respondent Board informed the petitioner company that its earlier decision of giving effect to reduction in demand from 22.6.1998 was not correct and it has since been reviewed and that the reduction in contract demand would be effective from 9.11.1998 the date on which the Government announced its captive power policy and not from 22.6.1998.

8.4 In pursuance of the same the petitioner made various representations which did not meet with any positive results. The respondent Board thereafter raised a demand for a sum of Rs.1.25 crores purporting to be towards the demand charges for the period from 22.6.1998 to 9.11.1998. Ultimately the petitioner company approached the Gujarat Electricity Regulatory Commission (GERC) which is registered as Case No.68/2002. The said case

is still pending before the GERC. In short the dispute with regard to the payment of the demand raised by the respondent Board is pending for adjudication.

9.0 In the meantime the respondent Board filed Civil Suit No.242/2002 in the Civil Court, Bharuch pertaining to the aforesaid demand. It is required to be noted that Application Exh.5 for interim injunction was rejected in respect of the recovery of amount between the period from 1.1.1998 and 22.6.1998.

10.0 The respondent Board conveyed to the petitioner by letter dated 17.5.2004 that it had adjusted an amount of Rs.1.36 crore being part of the amount claimed by the Board in the suit pending in the Civil Court at Bharuch against the bills of the petitioner company for electricity power sold by it to the Board. The said action is challenged in this petition.

11.0 Initially the petitioner had requested for reduction in contract demand which was not acceded to as the agreement period was not over. The said decision is dated 15.7.1997 at page 74. After completion of the agreement the petitioner had again applied, but the respondent Board has failed to consider the case of the petitioner. In the Resolution dated 22nd December 1997 clause 10 stipulates that the reduction of contract demand of the consumer would be permitted upto 25% of original contract demand if consumers

intends to have parallel operation.

11.1 It was open for the petitioner to request for reduction in contract demand. Thereafter by communication dated 14.12.1998 the petitioner was allowed to reduce contract demand from 25000 to 6250 which was again a stop gap arrangement on various conditions. Whether such a decision was legal or not is the subject matter before the competent authority. However, it is required to be noted that there is a dispute under adjudication and therefore the respondent was not right in proceeding with the recovery in question in an arbitrary manner.

12.0 It is an admitted fact that the petitioners' unit is one such unit that it has captive generation plant set up with the approval of the respondent Board, where power is generated for captive use and the excess generation is sold to the respondent Board on its need basis. For this purpose the respondent Board had entered into an agreement which prescribes the terms and conditions (including the rates) for purchasing power by the respondent Board from the petitioner's plant.

12.1 This agreement is entirely distinct and separate from the agreement entered into by and between the petitioner company and the respondent Board for supplying power to the petitioner company. In other words, the

agreement under which the respondent Board purchases power from the petitioner company is separate and distinct from the agreement under which the respondent Board sells/supplies power to the petitioner company and the terms and conditions including those relating to rates.

13.0 As per the agreement between the petitioner company and the respondent, the Board purchases power from petitioner company in case of need in entirely different capacity and the respondent Board is obliged to make payment at the rates prescribed in the said agreement for the power purchased by it from the petitioner company. A perusal of the said agreement does not empower the respondent Board to make unilateral adjustments of the amounts required to be paid by its consumer for the power sold/supplied by the respondent Board against the payment required to be made by the respondent Board for the purpose of power.

14.0 I am of the opinion that if there is any outstanding payment from the petitioner, then the respondent Board has alternative remedy under the law. In fact the respondent Board has already filed a civil suit for recovery of the said amount prior to the alleged adjustment. Learned counsel for the respondent is unable to point out anything from the record that the respondent Board is entitled to recover its outstanding dues by adjusting the payments due to the petitioner towards the power sold by the petitioner company to the

respondent Board.

15.0 Another aspect of the matter is that the alleged dues are disputed dues for which the petitioner company has pursued its remedy before GERC which proceedings are still pending where the petitioner might succeed in which case the GEB has to make payment. Whereas, if suit is decreed, then the GEB can recover the amount by way of execution and not in by way of the present adjustment. When such a dispute is pending, in ordinary course, the respondent Board ought not to have resorted to any coercive recovery. Once such adjudication is over, the petitioner company is bound to pay the amount if any due to the respondent Board. Even otherwise the respondent Board has already availed of alternative remedy by way of filing civil suit before the competent court for recovery of the alleged dues.

16.0 It is required to be noted that the respondent Board has already approached the Civil Court. Injunction application has been rejected. in spite of this fact the respondent Board has adjusted the amounts which is not permissible under law, especially when the respondent is a State agency. Such action certainly amounts to recovery of alleged dues without any decision by competent authority and/or court. It is also clear that such adjustment has been without giving an opportunity of hearing to the petitioner company. Therefore, there is violation of principles of natural justice.

17.0 On the facts of the case it is found that there is a serious dispute about the amount in question. It also transpires that the petitioner company has diligently pursued the matter in respect of reduction of contract demand and also with regard to the disputed payment. There is nothing on record to show that there is any inaction or deliberate delay on the part of the petitioner company. On the contrary, the respondent Board has failed to show that the Board can recover such amount against their outstanding bills to the petitioner company.

17.1 Apart from that the learned counsel for the respondents is unable to show anything from the record that under the law or any agreement the respondent Board can adjust the amount of bills for the electricity sold by the petitioner to the respondent Board in respect of the outstanding dues of the petitioner in connection with their electricity consumption. Therefore, I am of the view that the action of adjustment of the amount is without any authority of law and arbitrary.

18.0 In the premises aforesaid the petition succeeds. The impugned communications dated 17.5.2004 and 24.6.2004 are quashed and set aside. It is hereby declared that the action of the respondents of withholding and adjusting the bill amounts of the bills of the petitioners for the electricity sold

by it to the respondent Board is arbitrary and without authority of law. It is directed that the respondents shall release the payment of bills for the electricity sold by the petitioner to respondents forthwith. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]

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